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# Supreme Court of the United States

OCTOBER TERM, 1926.

No. 358.

ALBERT OTTINGER, as Attorney General of The State of New York,

*Appellant,*

vs.

THE BROOKLYN UNION GAS COMPANY.

## REPLY BRIEF ON BEHALF OF APPELLANT ALBERT OTTINGER AS ATTORNEY-GENERAL.

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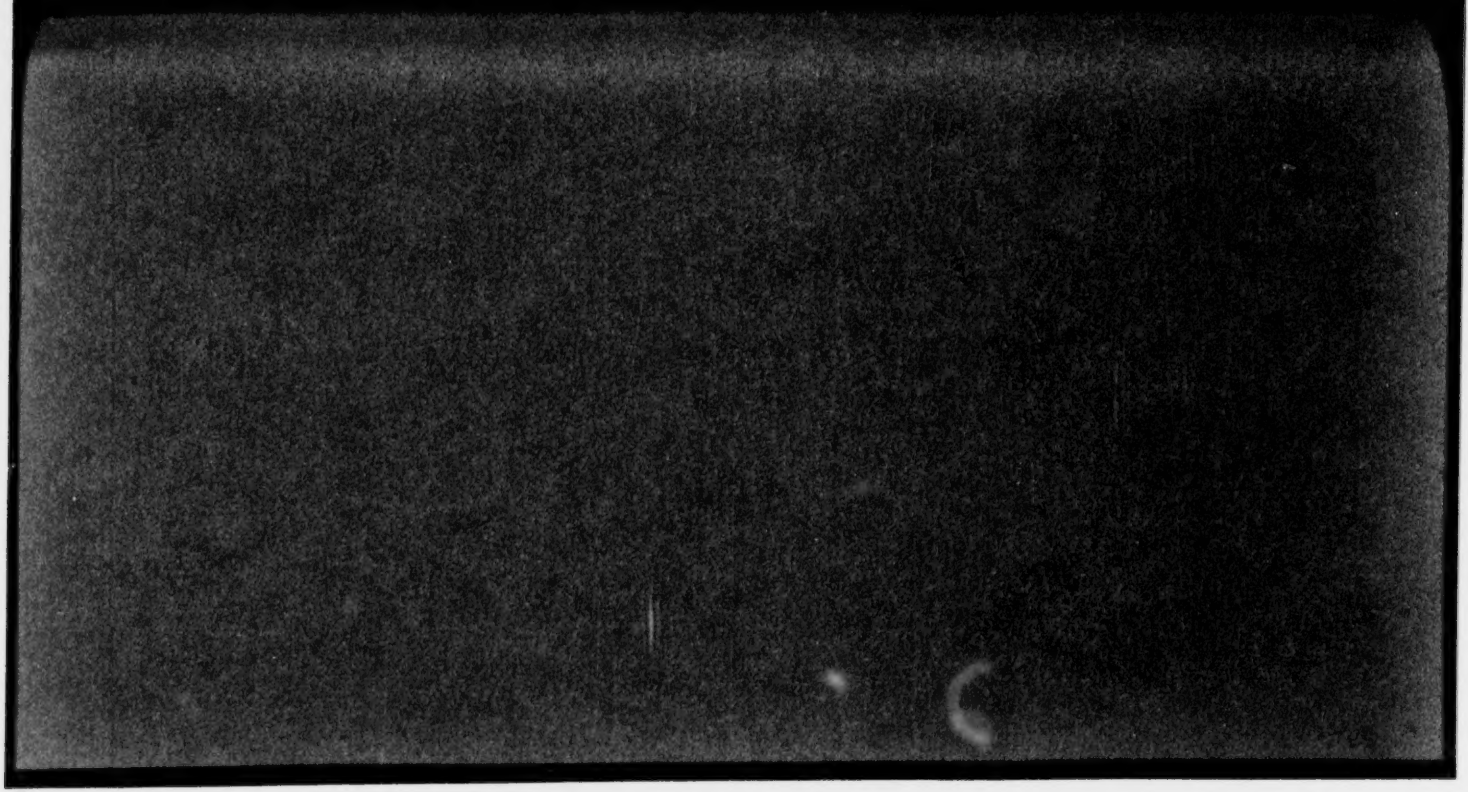

# Supreme Court of the United States

ALBERT OTTINGER, as Attorney General of The State of New York,

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vs.

THE BROOKLYN UNION GAS COMPANY.

## REPLY BRIEF ON BEHALF OF APPELLANT.

### Historical Cost.

Appellee answers appellant's contention of an over-night write-up of about $12,000,000 on the books of the vendee company by relying upon the testimony of Col. Miller on historical cost (Appellee's Brief, pp. 11-12). This, counsel for the company naively concludes "disposes of the charge of inflation and a write-up over-night" (Appellee's Brief, p. 21).

This testimony appellant argues serves to contradict the books of its own company (table given in our brief, p. 24) showing the closing entries on the vendors books as $16,524,095 and the opening entries on the vendee books as $28,799,731; it also contradicts, so counsel argues, the sworn testimony of the company's vice-president to the effect that this increment of $12,,000,000 was added upon the books of the company at the time of organization for intangbiles such as "good will" and "right to have mains in the streets" (our brief, pp. 19-25). Appellee again draws a pitiful picture of a defenseless witness harassed by counsel and removed from the guiding influence of appellee's learned attor-

ney; the witness was "misled by as able an advocate as ever rose to examine a witness"; "he was without the aid of counsel" and as a result of the ability of counsel (ex-Justice Charles E. Hughes) to "mislead" this helpless poor official of a gas company testifying concerning a subject upon which he had intimate knowledge, he was impelled to give "testimony adaptable to misuse" (Appellee's Brief, p. 73).

What is this testimony of Col. Miller that has this all powerful rebuttal force, setting at naught both the company's records and the testimony of its vice-president.

In effect he testified that the properties of the vendor companies *ought to have cost* $23,976,790. In this mystical estimate he included 16-2/3% for overhead charges (Rec., pp. 1237, 1137-1144).

The ingenious method used by this witness in arriving at his final result was to take the index number in 1895 as issued by the Bureau of Labor, and after preparing an average index number over a period from 1849 to 1895, to divide his estimate of the reproduction cost new of the property in 1895—which was given as $17,996,212—by 82.6, the index number of 1895, and multiply by 112.17, which was the average index number over the period from 1849 to 1895. In order to reach this result the witness assumed what could never have been a fact, to wit: that the same relative amount of additions was made uniformly to plants operated by different companies and in competition with each other throughout the period from 1849 to 1895. He did not know whether the Brooklyn Gas Light Company plant, for instance, was constructed entirely during the first year, nor what portions of it were constructed from 1849 to 1860, nor when the construction of the other plants was begun (pp. 1237, 1238, 1139-1444). The witness did

not assume the number of miles of distribution system first completed in any plant, assumed nothing with regard to the construction of the Union Plant in 1861; nor could he state what part of the Williamsburg plant was constructed in 1850. In fact, he made no specific assumption with regard to any of the plants except that the construction went ahead uniformly (pp. 1140-1141), and for such an assumption he gave not the slightest reason in support. He made no assumption as to what specific equipment the various plants had (p. 1141), and in fact, he stated that it would make no difference whether water gas or coal gas or "half and half" equipment had been installed (p. 1142). He could not identify the specific units of the machinery in use, nor which of the particular plants were the ones he had assumed to be manufacturing coal gas. In summing up, he stated he did not make any attempt to study the system by individual plants and after being critically examined by the Master with regard to the Brooklyn Gas Light Company, by which examination it was clearly shown that no specific facts had been assumed with regard to any of the properties of such company, he testified that he would make similar answer if interrogated regarding the other vendor companies. He could not even testify as to what was the normal expenditure for additions to the plant in any one year (pp. 1142-1144). Finally the witness could not give the proportion of the property assumed by him in his estimate, initially constructed and the proportion subsequently added. In all of his examination on this point, Miller could not give either in response to the repeated questions by the Master, or by counsel, a single specific fact which his estimate of so-called historical cost included.

An explanation of what historical cost should

contain was given by Mr. Justice Brandeis in the case of *State of Missouri ex rel. Southwestern Bell Telephone Company* v. *Public Service Commission*, 262 U. S., 276, 295, as follows:

> "(d) Historical cost, i. e., the proper cost of the existing plant and business, estimated on the basis of the *price levels existing at the respective dates when the plant and the additions were constructed.* This is often called prudent investment. Historical cost would, under normal conditions, be equal in amount to the original cost. The phrases are sometimes used to denote the same thing. But they are not the same; and they are often ascertained by different processes. Original cost is the amount actually paid to establish the utility. The amount is ascertained, where possible, by inspection of books and vouchers, and by other direct evidence. If this class of evidence is not complete, it may be necessary to supplement it by evidence as to what was probably paid for some items, *by showing prices prevailing for work and material at the time the same were supplied.* But the evidence of these prices is merely circumstantial, or corroborative, evidence of the amount actually paid." (Italics ours.)

It is apparent that the witness has failed to base his opinion upon "the price levels existing at the respective dates when the plant and additions were constructed," or upon the "prices prevailing for work and material at the time the same were supplied" in conformity with Justice Brandeis' definition of historical cost. The hypothetical assumption made by the witness that the construction progressed uniformly through the period preceding the purchase of the properties by plain-

tiff, has no foundation in fact, and we submit that an opinion based upon the manipulation of index numbers for *all classes of commodities* is worthless in endeavoring to find out the historical cost of the property of a gas company. Only the price levels for commodities constituting a gas manufacturing and distribution system should have any controlling force in an attempt to arrive at the historical cost of such property. Nor should evidence of this latter class of commodities be considered, except for corroborative purposes, when there are records available indicating clearly the actual cost of much of the property constructed and used by the utility in a given case. The record in the instant case contains many of the books and records of the vendor companies. The latter are replete with data showing unit costs of labor and material actually used in the construction of the vendors' properties, all of which Col. Miller disregarded in forming his opinion as to historical cost. Even the books and records of the Nassau Gas Light Company, in effect, were treated by this witness as if they never existed. Yet it appears from the testimony of Mr. John J. Welsh, of the Commission's accounting department, and from Defendants' Exhibits 102-A, 106-A to 130-A inclusive, prepared by him, that the books of the Nassau Company may be fairly said to contain substantially the cost of construction of that company's manufacturing plant (pp. 1343-1350, 1360-1368, 1391-1399). Mr. Welsh's opinion was based upon a detailed and painstaking examination of the Nassau Company's books and records, and upon his knowledge and experience gained from examination of books of other utility companies.

Again as to the books of the Williamsburg Gas Light Company, we have the opinion of Mr. Frank P. Saffer, also an experienced accountant, that the construction account of that company, after the

restoration of the amount which had been charged off to "Profit and Loss," would show substantially the cost of construction of the item set forth in that account (pp. 1320-1337). With respect, therefore, to the books of the Nassau and Williamsburg companies, we have the opinions of experienced accountants that the costs of construction are substantially shown in the books of those companies. Yet Col. Miller gave those books no consideration in arriving at his figure as to the historical cost of the properties of those companies. It is respectfully submitted that his estimate of such cost is therefore valueless.

This is the character of the testimony that counsel for appellee claims "disposes of the charge of inflation."

## Mains and Services.

Counsel for appellee attempts to "explain away" White's several estimates of the value of mains. and services. No amount of argument can, however, throw a sufficient smoke screen to hide the facts. The following table shows these facts clearly:

WHITE'S SWORN TESTIMONY ON MAINS.

| | Miles | Estimate |
|---|---|---|
| (1) As of Oct. 1, 1919 at unit prices of July 1, 1914 | 1,013 | $6,567,070 |
| (2) Report to State Tax Commission as of Dec. 31, 1922 | 1,042 | $8,080,759 |
| Total replacement value of mains (Deft.'s Sx. 28, p. 2140 | | $9,955,496 (Including general Contractors' expenses and 12% for interest, Taxes. etc.) |
| (3) 1923, in affidavit upon application for preliminary injunction in this case; Prices as of Jan. 1, 1923 | 1,013 | $16,206,284 |
| (4) Testimony in this case; Prices as of June 1, 1923 | 1,017 | $19,073,209 |

Witness White was equally "versatile" in his testimony on services.

WHITE'S TESTIMONY ON SERVICES.

| | | | |
|---|---|---|---|
| (1) As of October 1, 1919 but at Jan. 1, 1914 prices | 141,616 | services | $1,868,298.00 |
| (2) As of December 31, 1922 (Tax Report, Defs. Ex. 28) | 146,691 | " | 3,639,152.15 |
| (3) As of January 1, 1923 | 146,691 | " | 5,069,310.00 |
| (4) As of June 1, 1923 | 147,687 | " | 6,256,506.65 |

Making allowance for the omission of certain items in Estimate No. 1 (this does not contain general contractors' expenses, interest, taxes), it must be perfectly clear that the witness has given enormously inconsistent estimates of value, the very peak being reached in this case.

Two of the estimates are practically the same date (December 31, 1922, and January 1, 1923), and a third one 5 months later. Estimate No. 2, however, was given for tax purposes, while Nos. 3 and 4 for rate purposes. Any witness who can testify to such divergent estimates of the same property is hardly to be believed.

Counsel for appellee attempts to distinguish the basis upon which witness White made his valuation estimates to the State Tax Commission. He refers to the testimony of White on cross examination (p. 598). What actually happened was this. When White was confronted with the unexplainable variance between his two appraisals he began to fish around for an explanation. He said in substance, that after the report to the Tax Commission was offered for identification, that he submitted the figures on mains and services to the auditor of the company; that he did not know the information they (the Tax Commission) desired; that a representative went to Albany to ascertain this information for him, and that "some one came

back and told me that they wanted it made up on the historical theory" (p. 598). He evidently forgot what he put on the tax report itself. This distinctly contradicts his "explanation"; the report to the State Tax Commission is in evidence and printed as Defendant's Exhibit 28 (fols. 2140-2141). In order that there may be no misunderstanding that the company was valuing its mains and services at *replacement value* and not historical cost or on any other basis, we set out in full folios 3263, 3264 of Defendant's Exhibit 28.

THE BROOKLYN UNION GAS COMPANY

VALUE OF MAINS IN STREETS

As of December 31, 1922

| Size | Number of feet in ground | Cost per foot | Value |
|---|---|---|---|
| 1¼" | 1,207 | .4542 | $ 548.22 |
| 1½" | 6,414 | .4638 | 2,974.81 |
| 2" | 24,603 | .5024 | 12,360.55 |
| 3" | 300,881 | .9016 | 271,274.31 |
| 4" | 1,707,891 | 1.0037 | 1,714,210.20 |
| 6" | 2,011,201 | 1.1486 | 2,310,065.47 |
| 8" | 450,135 | 1.3614 | 612,813.79 |
| 10" | 139,580 | 1.9500 | 272,181.00 |
| 12" | 485,663 | 2.2420 | 1,088,856.45 |
| 16" | 126,114 | 3.0457 | 384,105.41 |
| 20" | 153,799 | 4.6905 | 721,394.21 |
| 24" | 59,810 | 5.7048 | 341,204.09 |
| 30" | 16,464 | 7.1300 | 117,388.32 |
| 36" | 8,442 | 10.4798 | 88,470.47 |
| 42" | 10,694 | 13.3638 | 142,912.48 |
| | 5,502,898 | | $8,080,759.78 |
| Plus 10% for general contractor's expenses ..... | | | 808,075.98 |
| | | | $8,888,835.76 |

| | |
|---|---|
| Add 12% for overhead charges to cover interest, engineering, taxes and insurance during construction ..... | 1,066,660.29 |
| Total Replacement Value | $9,955,496.05 |

No roadway pavement included.
Costs are based on averages of actual prices paid.
Eight-hour day labor schedule used.

February 28, 1923—3—CE.

## THE BROOKLYN UNION GAS COMPANY

### VALUE OF SERVICE IN GROUND

### As of December 31, 1922

| Size | Number in ground | Cost per Service | Value |
|---|---|---|---|
| ¾" | 7,864 | $16.9210 | $ 133,066.74 |
| 1" | 13,222 | 17.6986 | 234,010.89 |
| 1¼" | 84,717 | 19.5623 | 1,657,259.37 |
| 1½" | 34,234 | 20.0243 | 685,511.89 |
| 2" | 5,666 | 21.8143 | 123,599.82 |
| 3" | 837 | 42.2239 | 35,341.40 |
| 4" | 115 | 49.0281 | 5,638.23 |
| 6" | 27 | 69.6078 | 1,879.41 |
| 8" | 7 | 343.9160 | 2,407.41 |
| 12" | 2 | 386.9646 | 773.93 |
| | 146,691 | | $2,879,489.09 |
| 21,650 Valves and Roadway Boxes | | | 74,368.17 |
| | | | $2,953,857.26 |
| Plus 10% for general contractor's expenses ..... | | | 295,385.73 |
| | | | $3,249,242.99 |

| | |
|---|---|
| Add 12% for overhead charges to cover interest, engineering, taxes and insurance during construction ..... | 389,909.16 |
| Total Replacement Value | $3,639,152.15 |

No roadway pavement included.
Costs are based on averages of actual prices paid.
Eight-hour day labor schedule used.

February 28, 1923—3—CE.

It is pertinent to note also that in the prior case of this company (*Brooklyn Union Gas Company* v. *Newton*), the findings of the State Tax Commission as to the value of mains and services was the sole element of value introduced by the company, and the company relied not only upon such determination of the State Tax Commission for value of mains and services, but it also relied upon the value found by the taxing authorities of The City of New York in respect to lands and buildings. Where there is a disparity between the valuation of $9,950,000 and $19,073,000 in a sworn report to the State Tax Commission and testimony by the same witness in a rate case for the same property, as of approximately the same date, this Court may very well take notice that something is materially wrong. A failure to take judicial recognition of such an enormous difference in valuation encourages a public utility to vastly understate the value of its property in order to escape taxation, or tremendously to inflate the value of its property for the purpose of securing increased rates.

## Securities.

The appellant repeats its contention concerning the securities of the appellee (main brief, pp. 31-33). The appellee bought the bonds of four of the subsidiaries for $5,222,000. This is admitted in brief of appellee (p. 66). The date of the purchase was 1922 instead of 1895. The date is immaterial. Our contention that the securities representing the capitalization of the subsidiary companies should not be included in the total securities of the appellee for the purposes of fixing a rate base remains unassailed. Appellee's contention that its book surplus of $7,000,000 plus its contingency or depreciation fund of $12,000,000 (this has gone back into plant) should be added to its securities total is a fantastic theory having no foundation in law or fact.

It is practically admitted (Appellee's brief, p. 67) that "10% working for subsidiaries" should or ought to be deducted. This amount is given by the appellee as $5,727,800.

## Depreciation.

Counsel for appellee seems to now take the extraordinary position that witnesses Miller's and Burt's amounts "necessary to expend to put the property in a condition equal to new" constitute depreciation (Appellee's brief, pp. 41, 43). While no direct assertion is made that the small amounts set out by these witnesses for "deferred maintenance" may be considered "depreciation", still such is the suggestion made by counsel. This surely is a weird and untenable position in view of the statement by counsel for appellee quoted in our main brief (p. 74) to the effect that the small outlay for current repairs *were not to be dignified by the long name—depreciation,* and the statement of the

Master (Opinion, p. 211), "So that the plant being kept in a high order of efficiency by such replacements," *the plaintiff's witnesses do not consider that there is any depreciation.*" How does counsel reconcile his position with the testimony of the witnesses Miller and Burt concerning these items? In our main brief, pages 78, 79, there were given extracts from the testimony of these witnesses to the effect these small sums were not considered a measure of depreciation at all.

The appellee has apparently reconsidered the advisability of taking the position that depreciation does not exist in its property. This was unquestionably its position at the trial, but apparently the danger and vice of such an attitude is beginning to become clear to the legal advisors of these companies and they are now making a belated, eleventh hour attempt to indicate what their proof in the case entirely lacked—to wit, any showing of depreciation.

Counsel for appellee relies upon Pacific Gas Co. v. San Francisco, 265 U. S., 403; N. Y. Tel. Co. v. Prendergast, 300 Fed., 822; Westinghouse Co. v. Denver Co., 3 Fed., 2nd, S. 285; as authority for the proposition that depreciation can only be found based on definite testimony of observed conditions.

If this be the law, appellant contends that it is not, it is still vigorously urged that the burden of producing such testimony was *upon the plaintiff-appellee.* It was one of the vital parts of the company's case; failure to produce such proof constituted an "incomplete case," Minnesota Cases (supra). The cases cited certainly in no wise can be construed as shifting this burden of proof upon the attorney-general defending a legislative rate.

## Pacific Gas Co. Case.

This case has been analyzed in our reply brief in the Consolidated case and this Court is respectfully referred thereto.

The engineer of the Pacific Gas Co. gave testimony of observed depreciation, including both obsolescence and inadequacy.

He made substantial allowances for what he termed "Accrued Deterioration, Expected Abandonments and Replacements." The following table indicates some of these allowances:

| Property | Depreciation Deductions |
|---|---|
| Auxiliary Exhauster House ..... | 20% |
| Martin station ..... | 40% |
| Low pressure Iron Mains..... | 30% |
| High pressure Iron Mains..... | 20% |

Compare this with the absolute denial of depreciation by witness Burt and Miller!

As opposed to this the expert of the City offered as a measure of depreciation theoretical tables purporting to show the life of each type of gas property and asked the Court to fix a deprecation figure based upon this "mortality table" and the age of the property. With the record of the case in this condition this Court, as we interpret the decision in the Pacific case, merely stated that the testimony of actual observed depreciation is *preferable* to the averages of expectant life. The Court did not deny the existence of depreciation: it in fact specifically recognized its existence. *The Court did not obsolve the plaintiff company from proving depreciation;* on the contrary, the Court approved the minute proof the company had given and held that under the circumstances the Court *preferred* to rely upon such proof rather than on "assumed probabilities."

In the instant case, however, the appellee company not only submitted no proofs of depreciation, observed or otherwise, but positively denied the existence of depreciation. Its counsel and witnesses reiterated this attitude throughout the trial (see references in our main brief, pp. 74-81). For the first time the appellee companies, now before this Court, take the position that the inconsequential sums testified to by witnesses Burt and Miller are in the nature of depreciation proof, although both these witnesses admitted, during the trial of the case, that their testimony was not to be considered as covering depreciation. Can it be that the appellee companies now recognize what the appellant has contended for in its main brief—that the companies failed to prove one of the necessary and vital links in the case? Otherwise, why the constant references, both in the brief of the attorney for this company and in the brief of the attorney for the Consolidated Gas Company, to the testimony covering items "to put property in condition good as new" as "depreciation"?

A table is submitted showing the percentage deductions for depreciation in the two recent cases —the Pacific case and the Fort Smith case (supra) as compared to the correspondingly small sums deducted in the three cases now before this Court for the expense of "putting property in a condition as good as new."

## Comparison of depreciation deductions an d infinitesimal amounts allowed for costs "to put in condition as good as new."

| | Plants | Buildings | Mains | Services | Meters | Equipment | Appliances | Per Cent Deductions on Tangible Property | Per Cent Deductions on Total Reproduction Cost |
|---|---|---|---|---|---|---|---|---|---|
| CONSOLIDATED— | | | | | | | | | |
| Master's Reproduction Cost | $32,046,491 | $13,518,029 | $27,450,000 | $ 4,350,000 | $ 6,500,000 | $ 1,155,000 | $5,750,000 | | |
| Burt and Miller costs to put in condition as good as new | 1,656,276 | 184,152 | none | none | none | none | none | | |
| Depreciation % | 3.3% | 1.4% | | Tunnels 6,500,000 none | | | | 1.3% | .6% |
| BROOKLYN UNION— | | | | | | | | | |
| Master's Reproduction Cost | $14,500,000 | $ 7,000,000 | 18,000,000 | 6,250,000 | 4,000,000 | 600,000 | | | |
| Burt and Miller costs to put in condition as good as new | 528,000 | 20,756 | none | none | none | none | | | |
| | 3.6% | .3% | | | | | | 1.2% | .9% |
| KINGS COUNTY— | | | | | | | | | |
| Master's Reproduction Cost | $ 1,500,000 | $ 750,000 | 2,898,000 | 1,109,000 | 816,000 | | | | |
| Burt and Miller costs to put in condition as good as new | 416,500 | 1,800 | none | none | none | | | | |
| | .1% | .2% | | | | | | .6% | .4% |
| PACIFIC GAS CO.— | | | | | | | | | |
| | Not separated as to Plants, Buildings, etc. | | | | | | | | |
| Accrued deterioration, expected abandonments and replacements | Total appraisment $13,000,000 | | | | | | | | |
| | Deductions for accrued deteriorations $828,915—6.3% | | | | | | | —— | 6.3% |
| FORT SMITH CO.— | | | | | | | | | |
| Deterioration | 14% | 9% | 11% | —— | —— | 22% | | No figures available | |

In the *Westinghouse Case* (*supra*), the Court recognized the existence of depreciation. In fact, in that case the witness for the company testified that from his inspection he estimated depreciation at a figure amounting to $2,516,000. A second witness testified that in his opinion the depreciation amounted to $2,022,000. The Court said: "I think a fair amount to deduct under the proof for that purpose is $2,250,000" (p. 298). The situation is entirely different from a denial of the existence of depreciation, as in the instant case.

Counsel for the appellee entirely misunderstands the point that the Attorney-General made concerning the contingency or depreciation reserve fund. The Attorney-General does not contend that this fund "should be exhausted in payment of losses by inadequate rates before asking for relief." Our position is clearly set out in the main brief (pp. 71 through 86). We do not urge the use of this fund in payment of losses, but we do contend that, in the absence of any proof on depreciation by the company, this Court may very well accept the depreciation reserve as a fair and proper measure —in fact, the company's own estimate of depreciation in its property—and we further urge that since the proceeds of this fund were reinvested in the property of of the company, the amount of the fund should be deducted from the rate base, relying upon the decision of this Court in *Louisiana* v. *Cumberland*, 212 U. S., 414, wherein this very point was squarely determined by this Court, and also the decision of a former member of this Court, Justice Hughes, in the case of *Brooklyn Borough Gas Company*, P. U. R., 1918-E., 335. Until this Court reverses the Cumberland case our position has the approval of this Court.

## Master on Depreciation.

Brief for appellee sets out in bold type (p. 97) "Full deductions for depreciation was made by the Master."

This statement is absolutely unfounded. The opinion of the Master and the Court state the contrary unqualifiedly and the testimony of all the company's witnesses on property values—Burt on Buildings, Miller on Plants, White on Mains and Services (Main Brief) show such a statement to have no foundation; lastly, counsel for appellee during the trial admitted that he was not proving depreciation (supra).

A reference to the opinions of the Master and the Court will suffice to settle such an absurd assertion.

Master's Report (p. 114):

> "No proof was produced before me showing whether any factor of depreciation, including wear and tear, obsolescence, inadquacy or other causes existed tending to lesson the worth of the various buildings and plant equipment, except that it appeared in evidence what expenditure would be required to restore the same to a condition equal to new and this evidence was not contradicted."

Accordingly the Master made no deductions for depreciation.

The Court said (p. 210):

> "The defendants contend that the Master erred by failing to deduct from the amounts as found by him a proper amount for depreciation of the several items, and ask this Court to deduct depreciation from what it may find to be the cost of replacement of the several items, but no evidence was offered by the defendants

to show that there was any depreciation or what was the amount thereof, either in rate based on percentages or in any fixed sum."

And again at (p. 211) ::

"Not only did the defendant fail to call any witnesses to show depreciation, but the witnesses for the plaintiff, as to nearly all items, testified that there was none.

"The defendants now claim that the Master erred in not making deductions for depreciation as to the several items making up the cost of replacement, but I cannot agree with them, because if they desired such a finding, the defendants, with the large corps of experts under their control, could have easily shown the fact, if such it be, and the basis on which depreciation should be figured, and having failed to make any such showing, they cannot complain because the Master failed to make such findings."

Nothing could be further from true than the statement "Full deductions for depreciation was made by the Master."

## Incomplete Case.

Counsel for appellee (Brief, p. 119) offers to explain the failure of proof of depreciation upon the ground that the company at all times was ready to place its books and records at the appellant's disposal. We agree that this was done and, insofar as this company is concerned, we are glad to admit a willing co-operation, both in the trial and in the preparation of the appeal, by counsel for the appellee. But this hardly operates to shift the burden of proof, as we have stated, in our main brief and

in our rely brief, at various times. The burden of showing depreciation was upon the plaintiff-appellee and their failure to assume this burden cannot be overcome by any or all of the lame excuses offered on page 120 of appellee's brief.

## Rates in 1921 and 1922.

Appellee in its brief stated that this company was free to fix its own rates from May 4, 1921 to October 1, 1922. Appellant's brief denies this (p. 122). The rates during this period were $1.50 and $1.25 per M and were fixed by the voluntary action of the company. Appellee seems to contend that because the company filed a schedule with the Public Service Commission setting forth these rates, and because the Commission failed to suspend them, that the rates were not fixed by the company. As a matter of fact the rates in 1921 and 1922 were just as much unregulated as in 1875 or at any time prior to 1895 when the first statute was passed regulating the company's rate. Ever since the State of New York has been a sovereign state there has been on inherent power in its legislative body to regulate rates. Yet this Court in Wilcox v. Consolidated Gas Company, 212 U. S., 19, 45, in speaking of the companies which merged into the Consolidated in 1884, said:

> "The evidence shows that from their creation, down to the consolidation in 1884, these companies had been free from legislative regulation upon the amounts to be charged for gas. They had been most prosperous."

The situation was the same as to the various appellees here from sometime in 1921 to October 1, 1922. Though, as this Court said of these other companies "subject to the legislative right to regulate" (id., p. 45) they were free from regulation.

## Comparison of Rates in other Cities.

Concerning the rate charged by the Peoples Gas Light Company of Chicago, appellee raises the point that the 95¢ rate set forth in a table in our main brief (p. 12), giving the Chicago rate of 95¢ per M, is but a secondary rate. The primary rate is 60¢ for the first 400 cubic feet. It is very evident, of course, that the average consumer will use well above 3,000 or 4,000 cubic feet per month, so that the primary rate of 60¢ would make very little material difference in the total rate. A consumer using 4,000 cubic feet (this is well below the average monthly consumption) would be rendered a bill of 60¢ for the first 400 cubic feet, plus $3.42 for the next 3,600 cubic feet, being at the rate of 95¢ per M. This would give a total bill of $4.02 for 4,000 cubic feet—still a rate of a dollar per M, and of course as the consumption increases the rates approximate more closely the 95¢ per M basis.

## Operating Expenses.

In discussing operating expenses appellee takes occasion to charge many inaccuracies in appellant's calculations.

He first (p. 77) charges that manufacturing costs are not as found by the Master in the Consolidated case, and that distribution expenses are not taken at the figure allowed by the Master in the Kings County Lighting Company case; such claim is made in our main brief at page 130.

As a matter of fact the statements made are accurate.

The Master in the Consolidated case found a production cost per M, made of 48.45 cents per M sold as of 1924 (Record, Ottinger v. Consolidated, p. 181). We ask a production expense of 46.35 per M sold. The difference is entirely found in the cheap-

er oil purchased by the Brooklyn Union. Consolidated was paying 5.38 cents per gallon. The Brooklyn Union at the same time was paying only 4.8 cents per gallon (Record, p. 71). The difference in favor of the Brooklyn Union is, therefore, about 2.04 cents per M as Brooklyn Union used 3.52 gallons of oil per M. This almost exactly accounts for the difference.

Mention should probably have been made in our main brief of the fact that the comparison was made by taking into account the difference in oil price. The inadvertence should not have and undoubtedly did not mislead counsel for appellee as our claim has always been the same in this particular.

As to distribution expenses being as found for the Kings County Lighting Company case we are likewise accurate in our contention.

Our contention in the Brooklyn Union case is contained in the table on page 128 of our main brief. It starts with the Master's figure for distribution expenses, deducts therefrom the operating revenue, then deducts the other items contended to be improperly included giving a balance of 23.14 cents per M sold.

The comparative figures are as follows:

| | Brooklyn Union Main Brief p. 129 | Kings County Findings 24 and 30 pp. 66 & 69 |
|---|---|---|
| Master's figure for distribution.. | 27.36 | 26.45 |
| Plus uncollectibles ..... | .36 | .53 |
| | 27.72 | 26.98 |
| Miscellaneous operating revenue | 2.24 | 4.57 |
| Balance ..... | 25.48 | 22.41 |
| Other deductions ..... .. .. | 1.98 | .... |
| Net distribution ..... | 23.50 | 22.41 |

The comparable figures show that net distribution expenses of the Kings County as found by the Master were actually over a cent lower than those claimed for the Brooklyn Union.

Appellee's counsel says that the Master in the Kings County Lighting Company found distribution expenses plus "uncollectibles" as 27.98. If this were true our claim would still be good. The figure given is gross distribution not net and is comparable with a figure based on our table of 27.72 cents per M. As a matter of fact the Master's figure of gross distribution expenses in the Kings County Lighting case was not 27.98 cents but 26.98 as shown in our table above.

The difference, therefore, is greater than claimed if comparable figures are taken and it is appellee who is inaccurate.

## Works and Transmission Repairs.

Objection is taken (Appellee's brief) to the minor deductions for Works and Transmission Repairs, of about 1 cent in all. A simple average of amounts was taken in our main brief (pp. 109, 126). Claim is now made that these repairs increase directly with production and, therefore, the average should be a weighted instead of a single average. The point was never raised before nor is it sound. Repairs do not increase proportionately with output and calculations on the simple average basis are always made by the Public Service Commission.

## Promotion and Automobile Expenses. (Appellee's Brief, pp. 82, 84).

As we rely for these deductions on the Master's findings it is not necessary to go into the extensive calculations (see our main brief, pp. 123-126).

## Taxes (Appellee's Brief, pp. 86, 87).

It is unnecessary to go into the actual income tax paid by appellee and what it included. We claim the appellee would have had a return in 1924 of 21.17 cents or $3,239,089. Bond interest of the appellee amounted to $1,640,540 which would leave a balance of $1,598,559 subject to income tax. 12½ per cent. of this amount would be $199,819.87 which is less than the sum of $233,391 which we allowed appellee (Main Brief, p. 128). The deduction made should have been about $40,000 more than claimed on our operating costs. If anything is added to our costs the income tax would be proportionately reduced.

On gross earnings taxes the amount is so small per M. that it is hardly necessary to go into the complicated calculations. The claimed deduction is only $24,173.00, not $44,503.93 as appellee states at page 87 of its brief (see Main Brief, p. 129). The contentions raised by our Exhibit 156 (p. 2197) still stand. The calculation there shown makes no deductions for revenue received from subsiduaries or from any other source. The tax is computed on actual sales at the statutory rate of $1.00. The tax found by this method obviously is all that should be charged. The difference between this amount and the actual amount charged on the books is the deduction which should be made as such difference must be due to earnings not from the sale of gas.

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